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In The

Supreme Court of the United States

October Term, 1997

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the United States is charged with a duty to maintain a federal improvement, can it forgo such maintenance indefinitely while it considers unspecified upgrades to the improvement, then escape liability for damages resulting from the lapsed maintenance based on the discretionary function immunity?

PARTIES TO THE PROCEEDING

All parties in this Court appear in the caption of the case.

Petitioner The Travelers Indemnity Company of Illinois, Inc., is a subsidiary of The Phoenix Insurance Company, Inc., which is in turn owned by The Travelers Group, Inc., a publicly traded corporation. The Travelers Indemnity Company of Illinois has no nonwholly owned subsidiaries.

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OPINIONS AND ORDERS BELOW

The United States Court of Appeals for the Ninth Circuit issued a memorandum opinion in this matter, reprinted at Appendix A. The memorandum opinion incorporates by reference the Ninth Circuit's opinion in *National Union v. United States*, 115 F.3d 1415 (9th Cir. 1997), *cert. denied*, 118 S. Ct 1053, 140 L. Ed. 2d 116 (1998), reprinted at Appendix B. The United States District Court for the Central District of California issued Findings of Fact and Conclusions of Law, reprinted at Appendix C.

STATEMENT OF JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit filed on November 20, 1997. Petitioner The Travelers Indemnity Company of Illinois ("Travelers") timely filed a petition for rehearing and suggestion for rehearing *en banc* that was denied by order filed March 19, 1998, reprinted at Appendix D. This Petition was filed within 90 days of the entry of that denial, pursuant to 28 U.S.C. § 2101(c) and the Rules of the Supreme Court of the United States, Rule 13. The jurisdiction of this Court to review the judgment of the court of appeals is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on

> and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Appendix E, p. 29a.

The Federal Tort Claims Act, 28 U.S.C. § 2674, provides in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Appendix E, p. 30a.

The Federal Tort Claims Act, 28 U.S.C. § 2680(a), provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

> Government, whether or not the discretion involved be abused.

Appendix E, p. 31a.

The Rivers and Harbors Act, 33 U.S.C. § 541, provides in pertinent part:

> There shall be organized in the office of the Chief of Engineers, United States Army, by detail from time to time from the Corps of Engineers, a board of seven engineer officers, a majority of whom shall be of rank not less than lieutenant colonel, whose duties shall be fixed by the Chief of Engineers, and to whom shall be referred for consideration and recommendation, in addition to any other duties assigned, so far as in the opinion of the Chief of Engineers may be necessary, all reports upon examinations and surveys provided for by Congress, and all projects or changes in projects for works of river and harbor improvement prior to June 13, 1902, or thereafter provided for. And the board shall submit to the Chief of Engineers recommendations as to the desirability of commencing or continuing any and all improvements upon which reports are required. And in the consideration of such works and projects the board shall have in view the amount and character of commerce existing or reasonably prospective which will be benefitted by the improvement, and the relation of the ultimate cost of such work, both as to cost of construction and maintenance, to the public commercial interests involved, and the public necessity for the work and propriety of its construction, continuance, or maintenance at the expense of the United States.

Appendix E., pp. 31a-32a.

STATEMENT OF THE CASE

This case was initiated in the United States District Court for the Central District of California pursuant to 28 U.S.C § 1346(b), the Federal Tort Claims Act ("FTCA"), against the United States, acting by and through the Army Corps of Engineers. The action sought compensation for damage to the Portofino Inn at King Harbor, Redondo Beach, California, as a result of waves overtopping a federally designed, constructed and maintained breakwater. After detecting a two to four foot subsidence of the breakwater from design-height, the Corps had chosen to leave the breakwater in its subsided condition while it completed a feasibility study on an upgrade of the entire breakwater. Nothing was done to either correct the subsidence or to implement an upgrade of the breakwater, and two and one-half years after the subsidence was detected a storm sent waves over the lowered portion of the breakwater to cause the damage at issue. The District Court found that the United States was negligent in designing, constructing, maintaining and improving the breakwater, and entered judgment in favor of Travelers for $2,695,045. The Ninth Circuit overturned the District Court's judgment on the grounds that the discretionary function immunity shielded the United States from liability for the Corps' inaction.

A. Material Facts

Citing the Congressional authorization contained in Title I, section 101 of the Rivers and Harbors Act of 1950, the Army Corps of Engineers ("Corps") undertook the design, construction and maintenance of a breakwater at King Harbor, Redondo Beach, California. (Excerpts of Record ("ER") 57.) The Corps outlined its plans for implementing that mission in its General Design Memorandum No. 1 ("GDM1"). GDM1 described the terms of the project:

> . . . improvement at Federal expense of a harbor at Redondo Beach for small-craft navigation as follows:
>
> (a) Reconstruction of about 1,485 linear feet of the existing breakwater;
>
> (b) Construction of a 2,800-foot extension to the existing breakwater and a south breakwater 700 feet long; and
>
> (c) *Maintenance of the entire existing breakwater as reconstructed, the breakwater extension and the south breakwater*. . . .

(ER 58 (emphasis added).) In GDM1, the Corps further acknowledged its maintenance responsibility:

> Under provisions of the authorizing legislation, the project would be operated and maintained by local interests, *except for maintenance of the breakwaters* and aids-to-navigation. Maintenance of the breakwaters is estimated at $30,000 per year.

(ER 71 (emphasis added).) Local interests were specifically required to provide all lands and rights-of-way necessary to the construction and maintenance, including transferring to the United States ownership of a preexisting section of breakwater. (ER 61.)

After the breakwater was built, the Corps instituted a program consistent with the project scope described in GDM1 to maintain it. (ER 171:4-8.) At the end of each winter season, the Corps inspected the breakwater to determine whether it conformed to design specifications, actually surveying the breakwater every year

or two to compare it to design condition, with the authority to make any repairs necessary. (RT at 22:14-25:22.) Over the years, the Corps effected repairs to the breakwater as it was damaged by severe storms. (*See* ER 104, 105; Supplemental Excerpts of Record ("SER"), 100, 101.)

By 1984, the Corps recognized that development of the harbor had mushroomed, and that storm damage was occurring to, among other things, waterfront property. (ER 141, 142-43, 148, 149, 151; SER 103.) It conducted an Evaluation Report of the harbor, and recommended that the breakwater be raised from its design height of fourteen feet to a height of twenty-two feet. (ER 137-55.) In that report, the Corps urged "early action be initiated due to the recurring nature of the undesirable condition." (ER 155.) It suggested a feasibility study to implement the upgrade. (ER 155.)

In 1985, during the feasibility study, the Corps discovered that portions of the breakwater had subsided two to four feet below design height. (ER 172:1-173:15.) However, the Corps did not make repairs necessary to restore the breakwater to design condition. It decided to wait and incorporate repairs into any upgrade ultimately effected as a result of the feasibility study. (ER 182:10-183:10.) But no upgrade or other repairs to the breakwater were ever implemented, and two and one-half years later, in January, 1988, a severe storm occurred, resulting in waves overtopping the subsided breakwater that destroyed several businesses along the waterfront, including the Portofino Inn. (ER 221.) The storm further damaged the breakwater itself. (ER 235.) The Corps immediately repaired the breakwater. (ER 235.)

B. Decisions Below

The District Court found that the United States was negligent in designing, constructing, maintaining, and improving the

breakwater. (ER 369, 375; Appendix C, p. 23a.) It found that the Corps had failed in its maintenance obligation for two and one-half years after discovering subsidence. (ER 373-74; Appendix C, pp. 22a-23a.) The District Court ruled that the discretionary function exception asserted by the United States did not apply to the Corps' decision to forgo maintenance of the breakwater at the level set by the original design memorandum. (ER 375; Appendix C, p. 26a.) Judgment was entered in favor of Travelers in the amount of $2,695,045. (ER 392.)

The Ninth Circuit, without allowing oral argument, overturned the District Court's judgment, holding that the discretionary function immunity did apply. It stated that decision in a two-sentence memorandum opinion, referring to its published opinion in the related case of *National Union Fire Ins. Co. v. United States*, 115 F.3d 1415 (9th Cir. 1997), *cert. denied*, 118 S. Ct 1053, 140 L. Ed. 2d 116 (1998), as dispositive of the issue. (Appendix A, pp. 1a-2a.) The *National Union* case involved damages to another waterfront property in King Harbor as a result of the same storm. That case had been tried separately, although findings as to the United States' liability were applied on the basis of collateral estoppel in this case, including the decision that no discretionary function immunity applied.

The *National Union* court identified the critical decision by the Corps that lead to the damage: its 1985 "gamble" in putting-off repair of the subsidence while studying the possibility of a larger improvement. (Appendix B, pp. 6a, 9a.) Significantly, the *National Union* court understood the decision not to repair the breakwater as a decision not to *improve* the breakwater. (Appendix B, p. 9a.) Looking to the legislation conferring authority on the Corps to weigh cost as a factor in recommending federal improvements, 33 U.S.C. § 541, the *National Union* court concluded that the decision not to repair the breakwater was the Corps' to make, and so fell within the discretionary function exception to the FTCA. (Appendix B, pp. 9a-10a, 15a).

But the Ninth Circuit here failed to address evidence, not part of the record in *National Union*, that in addition to expressly assuming a maintenance duty, the Corps had instituted a policy of annually inspecting the breakwater with authority to repair, and over the years had effected necessary repairs to the breakwater. (*See* ER 104, 105; SER 100, 101; RT at 22:14-25:22.) The Ninth Circuit further departed from authorities holding that budgetary considerations do not confer discretion not to maintain federal improvements as required by statute or policy. In doing so, the Ninth Circuit created precedent for the United States to assert the discretionary function immunity any time it faces liability for its failure to maintain a federal improvement simply by claiming that it was considering unspecified, future action to upgrade the improvement as a whole, and so held-off performing any maintenance effort.

REASON FOR GRANTING THE WRIT

AN IMPORTANT QUESTION OF FEDERAL JURISDICTION IS RAISED BY THE NINTH CIRCUIT'S DRAMATIC EXPANSION OF THE GOVERNMENT'S DISCRETIONARY FUNCTION IMMUNITY.

The Ninth Circuit's decision establishes a dangerous precedent. In effect, the Court has granted the federal government unlimited discretion to stop maintaining a public improvement that the government pledged to maintain, and had in fact been maintaining for years, without providing any notice of the consequent danger to persons and property in the area. The District Court made findings in this case as follows:

1. The United States had a duty to maintain the breakwater at King Harbor, Redondo Beach, California (Appendix C, p. 25a);

2. The United States negligently failed to maintain the breakwater, not repairing it for a two and one-half year period after discovering subsidence (Appendix C, pp. 22a-23a);

3. The subsidence of the breakwater substantially reduced the protection previously afforded to property owned by Travelers' insured, the Portofino Partners, on the eastern side of the breakwater (Appendix C, p. 24a); and

4. The subsidence of the breakwater was a substantial factor in causing almost $2.7 million in damage to the Portofino Inn (Appendix C, p. 24a).

None of those findings was overturned by the Ninth Circuit. Instead, it held that the United States had the discretion to stop maintaining the breakwater, despite the disastrous consequences, and remain free from liability on the grounds that a larger public policy decision was also involved. That stretches the discretionary function exception to the FTCA too far and creates a rule that threatens to swallow the FTCA by removing any incentive for the United States to stand by its maintenance obligations regarding countless federal improvements.

The federal government operates thousands of public improvements across the country, many of which would become a serious safety hazard if not properly maintained; for example, roads, flood channels, dams, public buildings, even courthouses. Yet the Ninth Circuit would deprive federal courts of jurisdiction to hear cases arising from the United States' *knowing failure to maintain those improvements*, as long as it cites the potential of future upgrades as the excuse for its failure. The Ninth Circuit does not require that an upgrade actually be planned, that a definite

time-frame for accomplishing an upgrade be set, or even that people using the improvements or relying on their protection be notified that maintenance will cease. Rather, the United States is free to forgo its acknowledged maintenance duty indefinitely, shielded from liability for any resulting damage by the discretionary function immunity.

Both this Court and the circuit courts have been discerning in the types of decisions they find eligible for the protection of the discretionary function immunity. Only decisions involving policy considerations Congress intended to shield from judicial second-guessing are embraced by the immunity. *United States v. S.A. Empresa De Viacao Aerea Rios Grandense (Varig Airlines)*, 467 U.S. 797, 814, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984). The mere fact that some element of choice is involved in a governmental decision does not alone trigger the discretionary function immunity. *Arizona Maintenance Co. v. United States*, 864 F.2d 1497, 1504 (9th Cir. 1989). Rather, the decision must be rooted in social, economic or political policy. *Id.*; *see also Berkovitz v. United States*, 486 U.S. 531, 536-37, 108 S. Ct. 1945, 100 L. Ed. 2d 531 (1988) (even if challenged government action involves an element of judgment, discretionary function immunity only available for decisions grounded on consideration of public policy); *United States v. Gaubert*, 499 U.S. 315, 322-23, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991) (same).

Thus, while a decision made in designing a federal improvement will be afforded the protection of the discretionary function immunity, decisions implementing construction of that improvement or later maintenance of the improvement will not. *E.g., Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1031-32 (9th Cir. 1989) (defective design of a canal protected from liability, but negligence in constructing the canal not protected); *ARA Leisure Services v. United States*, 831 F.2d 193, 195-96 (9th Cir. 1987) (policy decision to construct roadway

without guardrail immune from liability, but failure to maintain roadway as designed not protected); *cf. Indian Towing Co. v. United States*, 350 U.S. 61, 69, 76 S. Ct. 122, 100 L. Ed. 48 (1955) (the obligation to maintain an improvement with due care is not a matter of discretion, but something the government, like any other party, is obligated to do with ordinary care). The distinction between protected and non-protected decisions has been described as the "planning" versus the "operational" nature of the decision. *Dalehite v. United States*, 346 U.S. 15, 42, 73 S. Ct. 956, 97 L. Ed. 1427 (1953).

The Ninth Circuit here mixes two separate decision-making processes, one regarding a planning-level decision and one regarding an operational decision, into one, thereby elevating an ordinary maintenance decision to the level of a protected policy decision. In doing so, the Ninth Circuit establishes precedent for elevating every maintenance decision to protected status: the United States can always assert that its operational decisions of how and when to maintain improvements are made in the shadow of possible future upgrades, so that any action it decides to take, or not take, constitutes an exercise of protected discretion. Such a rule would effectively excuse the United States from its maintenance duties where any federal improvement is concerned. While the United States is certainly free to decide not to maintain a federal improvement, it must also bear the consequences of that decision and face liability for resulting damage to others.

In this case, the Corps was charged with planning, reconstructing and extending a breakwater in King Harbor, Redondo Beach, California. (ER 57.) The Corps created a design memorandum, GDM1, outlining its plans for the project. (ER 58.) In GDM1, the Corps expressly assumed a duty to maintain the breakwater as reconstructed. (ER 58, 61, 71.) Years after the breakwater's initial reconstruction, the Corps noted expanded development of the harbor and recurring damage to waterfront

properties in the harbor suggested the breakwater should once again be overhauled. (ER 141, 142-43, 148, 149, 151, SER 103.) During a feasibility study of possible upgrades, the Corps noticed that portions of the breakwater had subsided by two to four feet from design height. However, it decided to forgo repair of the subsidence and wait for the results of its feasibility study without warning to waterfront property owners that the breakwater would be left in a subsided condition. (ER 182-83; *see, e.g.,* RT at 23:20-25:8, 246:18-247:1.) Maintenance of the breakwater lapsed for two and one-half years, with no upgrade implemented. (ER 221.) Only after the damaging storm at issue here was the breakwater repaired. (ER 235.)

Travelers submits that under the authorities of this Court, as well as the circuit courts, the Corps had two concurrent roles with regard to the breakwater at the time it detected the subsidence. While it was exercising discretionary design authority in contemplating an overhaul of the breakwater, it was also obligated to maintain the breakwater in its design condition. The Corps' decision to abandon its maintenance of the breakwater indefinitely, in favor of mere consideration of an upgrade, was not the type of decision Congress intended to shield from judicial second-guessing. The Ninth Circuit seized upon two aspects of the Corps' decision not to maintain the breakwater that it felt elevated the Corps' maintenance decision to the policy level: that the Corps' decision involved a cost-benefit analysis; and, that it could not discern any specific Corps policy requiring repair of the breakwater. (Appendix B, p. 10a, 15a-17a.) However, those considerations do not suffice to transform an operational decision into a protected planning decision.

Firstly, the discretion to decide upon the lowest-cost option in implementing a project does not per se make the decision a discretionary function. For example, in *Arizona Maintenance, supra*, the United States was engaged in conducting subsidence

surveys to implement the Central Arizona Project, regulating the flow of the Colorado River. *Arizona Maintenance* at 1498. The government's decision to use the cheapest and easiest method of doing such surveys — blasting dynamite for a seismic refraction study — was held not to be a discretionary decision. *Id.* at 1504. Having been charged with a duty to conduct such surveys, the government then had to use due care in accomplishing the task. *Id.* Selection of the cheapest survey method did not involve sufficient protected policy considerations to trigger the exception. *Id.* Here, the Corps was charged with maintaining the breakwater as reconstructed. Choosing the lowest-cost method of doing so was not a protected decision.

Secondly, the Ninth Circuit overlooked the Corps' policies requiring it to maintain the breakwater in order to find that the Corps was not implementing any specific program in rendering its maintenance decisions. The very design memoranda created by the Corps in initiating the project directed that the Corps maintain the breakwater as reconstructed. (ER 58, 61, 71.) Additionally, Corps personnel testified at trial that as part of its maintenance program, the Corps inspected the breakwater annually to determine if it conformed to design specifications, with the authority to make repairs. (RT at 22:14-25:22). Indeed, over the years, the Corps did repair the breakwater when it was damaged by severe storms. (*See* ER 104, 105; SER 100, 101.) But even if there were no specific policy requiring repair of the breakwater, choices regarding maintenance activities simply not rise to the level of protected policy decisions shielded by the discretionary function immunity. *See ARA Leisure* at 195 (failure to maintain roadway in a safe condition was not an decision grounded in protected policy).

In short, the Ninth Circuit's reasoning in extending the protection of the discretionary function immunity to the maintenance decisions at hand cannot be sustained. More

importantly, this Court should review a decision that would grant the United States unlimited license to avoid its maintenance obligations by a simple assertion that an upgrade of the improvement might one day be undertaken.

CONCLUSION

For all the foregoing reasons, this Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 20, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-56275

D.C. No. CV-90-05237-MRP (Ex)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA

Defendant-Appellant.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Submitted November 17, 1997**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Appendix A

Before: HUG, Chief Judge; BEEZER and PREGERSON, Circuit Judges.

The United States appeals the district court's judgment in favor of Travelers Indemnity Company of Illinois, in Travelers' action pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 et seq. The district court lacked jurisdiction because the government conduct at issue is covered by the FTCA's discretionary function exception, 28 U.S.C. § 2680(a). *See National Union Fire Insurance v. United States*, 115 F.3d 1415 (9th Cir. 1997).

REVERSED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 10, 1997

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-55531

D.C. No. CV-88-06962-MRP

National Union Fire Insurance; Restaurant Enterprises Group,

Plaintiffs-Appellees,

v.

United States of America,

Defendant-Appellant.

and

Army Corps of Engineers,

Defendant.

No. 94-55586

D.C. No. CV-88-06962-MRP

National Union Fire Insurance; Restaurant Enterprises Group,

Plaintiffs-Appellees-Cross-Appellants,

Appendix B

v.

United States of America,

Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted
December 13, 1995 — Pasadena, California

Filed June 10, 1997

Before: Procter Hug, Jr., Chief Judge, Robert R. Beezer, and Andrew J. Kleinfeld, Circuit Judges.

* * *

OPINION

KLEINFELD, Circuit Judge:

This case turns on the discretionary function exception to the federal government's waiver of sovereign immunity for tort liability, under the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

Facts

For about a half century, the Army Corps of Engineers (Corps) has developed and improved King Harbor, in Redondo

Beach, California. The original purpose of the project was "to establish a harbor for small-craft navigation." Section 101, River & Harbor Act of 1950, Pub. L. No. 91-516, 64 Stat. 163, 166 (1950). It did so by building a fourteen foot breakwater, which was completed in 1958.

The fourteen foot breakwater built in 1958 was not high enough to keep waves from damaging boats in the harbor during storms. In the mid sixties, the Corps raised the level of portions of the breakwater to 22 feet. By then the City of Redondo Beach had begun developing this entirely man-made harbor. The City had constructed "moles," apparently massive deposits in the harbor on which building could take place. By the 1980s, the City of Redondo Beach was collecting $3.7 million in rent from the harbor, eight million people a year were visiting, and there were numerous restaurants, hotels, apartment complexes, sport fishing and whale watching tours, and boat and bicycle rental and sale facilities, grossing over $59 million a year.

Despite the elevation of portions of the breakwater to 22 feet, winter storms continued to cause damage, more dollars of damage as people developed the moles. After millions of dollars in damages during the winters of 1980 and 1983, the Corps studied possible major improvements, in addition to its annual maintenance. The plan was to increase the remaining 14 foot high portion of the breakwater to 22 feet.

In 1985, the Corps discovered that it had made a mistake in its calculations. The breakwater was not as high as it was supposed to be. The 14 foot section, over which the waves were washing, was only 12 feet high and not 14 feet. The Corps concluded that this was because the seafloor had subsided as a result of oil extraction. Because its measuring devices were out

of date, and it had not considered the potential for subsidence, the Corps had failed to discover the growing nonconformity of the breakwater to its design.

The Corps now had to decide whether to do nothing, raise the subsided portion of the breakwater back to fourteen feet, or await the results of an on-going study to decide whether to raise the breakwater in one larger project to 22 feet. Raising the breakwater a couple of feet was a major, not a trivial, engineering project. The Corps decided to leave the breakwater as it was, while it proceeded with studies directed toward more substantial improvement.

This decision was essentially a gamble on the weather. The Corps threw the dice, and the businesses on shore lost. A huge storm, the kind that hits Redondo Beach only once every sixty or seventy years, caused waves up to 21 feet high in January, 1988. They swept over the breakwater and caused almost $4 million dollars worth of damage to Reuben's Restaurant, whose owner and insurer brought this lawsuit. The theory of their lawsuit is that the government was negligent in failing to discover the subsidence and in failing to do something about it. The district judge held a bench trial, found liability and over $4 million dollars in damages, and awarded $2,485,110 in damages, as limited by the administrative claims plaintiffs' had filed. The government appeals the liability determination, while the insurer appeals the limitation on its damages.

Analysis

The facts above are taken from the district court's findings of fact as amplified by the exhibits and testimony. They are not at issue on this appeal. The controlling issue is whether the

discretionary function exception of the Federal Tort Claims Act barred jurisdiction. The United States has the burden of proving the applicability of the discretionary function exception. *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992). We review *de novo* a district court determination that the discretionary function exception does not apply. *Richardson v. United States*, 943 F.2d 1107, 1110 (9th Cir. 1991).

The Federal Tort Claims Act subjects the United States to liability for torts by its employees, generally in the same manner and to the same extent as a private individual under like circumstances:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674.

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under

> circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

In addition to the statutory condition, that liability be measured by the extent to which a private person would be liable, there is a statutory exception for performance of discretionary functions:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a *discretionary function* or duty on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused.*

28 U.S.C. § 2680(a) (emphasis added).

As the statute expressly provides, so long as the federal agency or employee was performing a "discretionary function," the exception applies, even if the discretion was abused. The cases are, if used merely as a source of "rules" in the form of quotations, hard to apply, because they seem on their face somewhat contradictory, with a fair amount of backing and

filling. Statements of law in cases are not statutes. They are explanations of why the court decided the particular case as it did. But when the facts of the cases are considered, the pattern becomes clear enough, and this case is plainly more analogous to the precedents holding that the discretionary function exception applies.

For purposes of analyzing the discretionary function question, we assume that the government should have discovered that the breakwater was not as high as it was meant to be, and failed to discover it only because it used outdated instruments. We also assume that had the Corps raised the breakwater two feet after discovering in 1985 that it was two feet lower than it was supposed to be, the 1988 storm would have done much less damage to Reuben's Restaurant. We further assume that the government's decision to put off the small improvement which would have raised the breakwater to design specifications, while it studied a much larger improvement, was a mistake in judgment and a failure to exercise reasonable care.

Despite these assumptions, we nevertheless feel compelled by controlling precedent to conclude that the discretionary function exception applies. The critical decision to which responsibility for the loss may be attributed was the one in 1985, to put off the smaller improvement while studying the possibility of a larger one. At that time, two and a half years before the storm which wrought the destruction, the Corps became aware of the subsidence, and the inadequate height of the breakwater. The issue, for the Corps, was what if anything to do about it, and when.

The Corps' statute directs it to consider the:

> desirability of commencing any and all improvements .... and in the consideration of such works and projects the Board shall have in view the amount and character of commerce ... which will be benefitted by the improvement, and the relation of the ultimate cost of such work ... and the public necessity for the work and propriety of its construction, continuance, or maintenance at the expense of the United States."

33 U.S.C. § 541. Note that the Corps is required by this statute to make a judgment balancing these sometimes conflicting considerations: (1) how much commerce benefits from the project; (2) what kind of commerce; (3) how much the project will cost; (4) how necessary is the work; (5) should the work be built, continued or maintained by the federal government, or some other entity.

In *Dalehite v. United States,* 346 U.S. 15 (1953), the government negligently stored fertilizer in vessels in a Texas harbor. The fertilizer exploded and killed many people. Nevertheless, the Supreme Court held that the discretionary function exception to the Federal Tort Claims Act shielded the government from liability. The Court distinguished between "acts of a governmental nature or function" and "ordinary common-law torts." *Id.* at 27-28. It noted that "Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions." *Id.* at 32. Discretion, in this context, means "the discretion of the executive or the administrator to act according to one's judgment of the best course." *Id.* at 34. It "includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations.

Where there is room for policy judgment and decision there is discretion." *Id.* at 35-36. The Court cited with approval a number of water destruction cases somewhat analogous to the one before us, such as property damage from changing the course of the Missouri, opening the gates of a dam, and releasing flood waters from a dam. *Id.* at 36 n.32. *Dalehite* notes that the decisions in that case were made "at a planning rather than operational level." *Id.* at 42. All the bad decisions which led to the catastrophe were made by the Field Director of Ammunition Plants, balancing safety against expense and reduced production, and that official's plan was faithfully carried out. The Court held that this planning error was insulated from liability. *Id.*

In *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), a ship was grounded because the government employees maintaining a lighthouse failed to check and repair a light in a government lighthouse, and negligently left the light out. The Court held against the government, but not on the discretionary function exception. The government had argued that the Federal Tort Claims Act held it liable "in the same manner and to the same extent as a private individual," and since no private individuals operated lighthouses, it could not be liable at all. *Id.* at 64-65. The Court rejected the government's suggested inference that maintaining the light was an exclusively governmental function, which was therefore not subject to liability. *Id.*, 350 U.S. at 64-65. In *Indian Towing,* no one made a discretionary decision to leave the light out — the people who were supposed to maintain it simply failed to do so. *Id.*; *see also Kennewick Irrigation District v. United States,* 880 F.2d 1018, 1024 (9th Cir. 1989) (quoting *Berkovitz v. United States,* 486 U.S. 531, 538 n.3 (1988)).

In *United States v. Varig Airlines,* 467 U.S. 797 (1984), numerous people had been killed, 124 because of a bathroom

fire in a commercial airplane, 4 because of a baggage compartment fire in an air taxi. The airplane owners sued the government for negligently issuing airworthiness certificates. The FAA had just spot-checked the plans and specifications, so it failed to spot the design errors that caused the accidents. The deficiencies were missed not because spot checks were negligently carried out, but because they were not adequate to discover all errors. Deciding to use spot checks rather than analyzing every detail of the plans was, the Court held, a discretionary function. The Court said *Indian Towing* did not implicate the discretionary function exception at all. *Id.* at 812. *Cf. Gaubert v. United States,* 499 U.S. 315, 326 (1991); *Berkovitz v. United States,* 486 U.S. 531, 538 n.3 (1988), *Kennewick Irrigation District v. United States,* 880 F.2d 1018, 1024 (9th Cir. 1989). But *Varig* qualified the operational planning level distinction in *Dalehite,* by holding that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Id.* at 813. The Court characterized the purpose of the exception as preventing "judicial 'second guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *Id.* at 814.

In *Berkovitz v. United States,* 486 U.S. 531 (1988), a baby was paralyzed by a defective polio vaccine. His parents sued the government for licensing production and approving release of the vaccine. The Court held that both claims should survive a motion to dismiss under the discretionary function exception. *Id.* at 548. The reason was that in both cases, as pleaded, the claims could be understood to allege violation of existing policies, rather than formulation of policies which allowed the harm to occur. "When a suit charges an agency with failing to

act in accord with a specific mandatory directive, the discretionary function exception does not apply." *Id.* at 544. The "nature of the conduct" test requires courts to "consider whether the action is a matter of choice for the acting employee." *Id.* at 536.

In *Gaubert v. United States*, 499 U.S. 315 (1991), government regulators trying to prevent bank failure had allegedly required two banks to merge, and then regulated the survivor into failure. *Id.* at 319. A major shareholder sued the government for destroying the value of his shares by commanding the mismanagement of his bank. Even though the bad judgments were made at the operational rather than the planning level of the agency, the discretionary function exception was held to apply. The reason was that "each of the regulatory actions in question involved the kind of policy judgment that the discretionary function exception was designed to shield." *Id.* at 332.

We applied this complex body of law in *ARA Leisure Services v. United States*, 831 F.2d 193 (9th Cir. 1987). A tour bus in Denali National Park had rolled down a hill, killing 5 people and injuring 25. The reason was that there was no guardrail, the road had been allowed to erode from 28 feet to 14.6, and the shoulders were too soft to support the bus. We held that the lack of a guardrail could not give rise to liability, because of the discretionary function exception. The reason was that the National Park Service had made a policy decision to sacrifice human safety to esthetics. The guardrail was missing on purpose, so that the road would "lie[ ] lightly upon the land." *Id.* at 195. But the narrowness of the road and inadequate shoulders were not shielded from liability, because there was no policy to allow that deterioration, and Park Service policies

instead required that park roads conform to the original alignments and be firm. We rejected the government's argument that budgetary constraints should shield its inadequate road maintenance, because "the fact that Park Service maintenance personnel were required to work within a budget does not make their failure to maintain Thoroughfare Pass a discretionary function. . . ." *Id.*

In *Kennewick Irrigation District v. United States,* 880 F.2d 1018 (9th Cir. 1989), the government negligently designed and built an irrigation canal, using silt without a concrete liner. This caused a train derailment resulting in extensive injuries and property damage. We held that the discretionary function exception applied to the design of the canal. The reason was that no policy required use of a concrete liner to keep the silt from washing away, and the government's design decision necessarily rested on a balancing of expense and quality. We took note of the "separation of powers concerns" raised in *Varig* and concluded that the exception had to apply, because there was no specific statute, regulation or policy requiring the government to design the irrigation canal in a manner which would have avoided the harm, and there was no violation of an established policy binding upon any particular government actor. *Id.* at 1021-22, 1027-28.

In *Childers v. United States,* 40 F.3d 973 (9th Cir. 1995), an eleven year old died, allegedly because the National Park Service left a part of Yellowstone open in the winter without adequately warning of the dangerous condition of the trail where the boy died. We held that the discretionary function exception applied, because the applicable statutes and policies left it to the agency's discretion the balancing of preservation and public access, requiring discretionary judgment about what sorts of safety features to provide. *Id.* at 974-76.

Appendix B

In *Glacier Bay United Cook Inlet Drift Association v. Trinidad Corporation,* 71 F.3d 1447 (9th Cir. 1995), an oil tanker ran aground on a rock which was not shown in the nautical chart. The owners sued the government for negligence in preparing the chart. We held that the exception did not apply, because the government manual and instructions required the soundings every 50 meters, and they did not do that. We interpreted *Berkovitz* and *Kennewick* to require a two-step analysis: first, whether the challenged action involved an element of choice or judgment, and if not, whether a federal statute regulation or policy specifically prescribed a course of action for an employee to follow. *Id.* at 1450. Second, we were to consider whether the judgment involved considerations of social, economic or political policy such that Congress should be understood to have shielded it from judicial review. *Id.* "The proper question to ask is not whether the Government as a whole had discretion at any point, but whether its allegedly negligent agents did in each instance." *Id.* at 1451.

We are compelled to conclude that this case is more analogous to *Dalehite, Varig, Gaubert, Kennewick, Childers,* and the guardrail in *ARA Leisure,* than *Berkovitz, Indian Towing,* and *Glacier Bay,* and the road width and shoulder in *ARA Leisure.* The decision in our case necessarily involved the exercise of discretionary judgment to balance the five statutory factors that are supposed to inform Corps decisions. No regulation or policy required the Corps to do something that it failed to do. No individual violated any specific regulation or policy. People at the planning level, *see Gaubert,* 499 U.S. at 335 (Scalia, J. concurring), exercised discretionary judgment about what the Corps should do about the breakwater, and decided to do nothing for the time being, because they thought it wiser to roll the smaller repair into a bigger improvement

later. Both parts of the *Berkovitz* test were satisfied. The Corps had statutory discretion, and the judgment was based on considerations of public policy.

There is an element which appears to make this case more like the road width in *ARA Leisure* than it really is. It was plain in *ARA Leisure* that the road was supposed to be 28 feet wide and was only 14 feet wide, and was supposed to have firm shoulders but instead had soft shoulders. *ARA Leisure*, 831 F.2d at 195. Likewise in the case at bar, the breakwater was supposed to be 14 feet high and it was only 12 feet high. That increased the force of the waves, which destroyed Reuben's Restaurant. But the legal difference is more significant than the factual similarity. In *ARA Leisure*, the regulation required the Park Service employees to keep the road shoulders firm and the road width at 28 feet. *Id.* In the case at bar, the breakwater height was specified in its design, but there was no regulation or policy requiring the Corps to monitor the breakwater height and assure that it continued to conform to its design specifications.

A word also needs to be said about cost. In *ARA Leisure*, we said that the agency could not invoke the discretionary function exception based on budgetary considerations, but in *Kennewick* we said that it could. In this case we also say that it could. These cases can be reconciled; whether the government can take cost into account depends on the applicable statutes, regulations, and policies. In *ARA Leisure*, the regulation required the Park Service to maintain the road width and firmness, not to balance that goal against what it would cost. In the case at bar, the statute expressly requires the Corps to consider the "relation of the ultimate cost of such work" to the other factors in deciding whether to do the work. 33 U.S.C. § 541. Where a statute or policy requires a particular government action, it has

no discretionary function immunity based on its choice to spend its money doing something else instead. But where a statute or policy plainly requires the government to balance expense against other desiderata, then considering the cost of greater safety is a discretionary function.

Appellee argues that once the government built the breakwater, it was under a duty to maintain it in a safe condition. That may be a correct statement of tort law, but we are not persuaded that it is true as a matter of the discretionary function exception. No statute, regulation or policy required the Corps to do so, and the applicable statute expressly gave the Corps discretion about whether to do so.

None of this is to suggest that the discretionary decision the government made was right. Congress expressly made the discretionary function exception applicable even where there is an "abuse of discretion." The wrong which makes this case troubling is that the government created a man-made harbor, people invested great fortunes in reliance upon the safety of the harbor, yet because of discretionary decisions made by the government, their property was damaged. But reasonable reliance on the government does not necessarily give rise to governmental duty. *Cf. Madera Irr. Dist. v. Hancock,* 985 F.2d 1397, 1403 (9th Cir. 1993). The government has an incentive to make itself reliable, because otherwise it must offer greater inducements and impose more coercion in order to elicit the conduct it desires. *See id.* at 1401. But it retains policy flexibility, in circumstances such as those of the case at bar.

We therefore conclude that the discretionary function exception to the Federal Tort Claims Act applied, so the district court lacked jurisdiction to award damages against the United

States. Application of the exception is often troubling, because it may be a shield for carelessness and poor judgment. (We do not intimate that it was in this case.) Private actors generally must pay for the harm they do by carelessness. The government's power to tax enables it, better than any private actor, to perform its conduct with reasonable care for the safety of persons and property, and to spread the cost over all the beneficiaries if its conduct negligently causes harm. Fairness might seem to suggest that the government should be liable more broadly than private actors. But at its root, the discretionary function exception is about power, not fairness. The sovereign has, by the exercise of its authority, reserved to itself the right to act without liability for misjudgment and carelessness in the formulation of policy.

We do not reach the question whether there was negligence under California tort law, or the question on the cross-appeal of whether the insurer's recovery was properly limited by its administrative claim.

REVERSED.

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED FEBRUARY 12, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 90-5237-MRP

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS, a corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FINDINGS OF FACT

1. This is an indemnity action by THE TRAVELERS INDEMNITY COMPANY ("TRAVELERS") against the UNITED STATES under the Federal Tort Claims Act, 28 U.S.C. § § 1346(b), 2671-2680.

2. West Group, Inc. and Portofino Partners ("Portofino Partners") owned the Portofino Hotel, the Portofino Apartments, the Portofino Marina and the Sea Bucket Restaurant ("the Portofino Inn") at King Harbor, Redondo Beach, California in January 1988.

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3. The Portofino Apartments and the Portofino Hotel are the buildings on Mole C labeled No. 11 and No. 12, respectively, in Figure A-1, "Harbor Plan", Corps of Engineers Feasibility Report, Storm Damage Reduction, Redondo Beach King Harbor Area, Technical Report, March 1988.

4. A severe storm hit the Redondo Beach area on the night of January 17-18, 1988. TRAVELERS insured Portofino Partners for storm damage to the Portofino Inn at King Harbor at the time of the storm.

5. The UNITED STATES ARMY CORPS OF ENGINEERS designed, constructed and maintained the King Harbor Breakwater.[1]

6. In 1939, the City of Redondo Beach completed construction of a 1,470 foot long breakwater at King Harbor.

7. In 1955, the Corps of Engineers prepared Design Memorandum No. 1, General Design for Redondo Beach King Harbor pursuant to Section 101 of the Rivers and Harbor Act of 1950.

8. Design Memorandum No. 1 proposed raising the breakwater height to 14 feet and extending the length of the existing breakwater by 2,430 feet. (Heights are all feet above Mean Lower Low Water. Mean Lower Low Water is the average of the lower low tides during the lunar monthly tidal cycle.)

---

1. All references herein to breakwater are to the *north* breakwater. The *south* breakwater at King Harbor is some distance away from the Portofino Inn across from Mole D. The parties agreed that only the north breakwater is relevant to this case. Pretrial Order, p.3. no. 1.

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9. The design wave was 15.2 feet high at the breakwater for the Design Memorandum No. 1 construction.

10. The Design Memorandum No. 1 construction was intended to raise the breakwater height to 14 feet.

11. Construction of the Design Memorandum No. 1 breakwater improvements was completed in 1958.

12. After completion of the Design Memorandum No. 1 construction in 1958, the Corps of Engineers surveyed the breakwater.

13. The breakwater was surveyed to be at or above its 14-foot design height in 1958 after completion of the Design Memorandum No. 1 construction.

14. In 1963, the Corps of Engineers commenced a study of further improvements to the breakwater. That study resulted in the Corps of Engineers preparing its 1964 Design Memorandum No. 2, General Design for Redondo Beach King Harbor, Redondo Beach, California. Design Memorandum No. 2 recommended raising the breakwater height to 22 feet between station 15+50 and station 36+00.

15. The 1964 construction was intended to raise the breakwater height to 22 feet between station 15+50 and station 36+00.

16. Construction of the Design Memorandum No. 2 breakwater improvements was completed in 1964.

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17. After completion of the Design Memorandum No. 2 construction in 1964, the Corps of Engineers surveyed the newly constructed breakwater high section (having a 22-foot design height), but did not re-survey the breakwater low section (having a 14-foot design height).

18. A 1985 Corps of Engineers survey of the breakwater height showed that the breakwater height was lower than designed over both the low section (14-foot design height) and the high section (22-foot design height). The 1985 Corps of Engineers breakwater survey results are as plotted in Figure A-4, "Profile of North Breakwater," Corps of Engineers Feasibility Report, Storm Damage Reduction, Redondo Beach King Harbor Area, Technical Report, March 1988. PTO, Agreed Facts, para.18. There was no evidence that the 1985 Corps of Engineers breakwater survey results as plotted in Figure A-4 are not accurate.

19. The Court's *National Union* Finding No. 16 was that:

> [p]ortions of the breakwater which were designed . . . to be +14 feet MLLW were only +10 feet MLLW and portions that were designed . . . to be +22 feet MLLW were only +20 feet MLLW.

National Union Finding No. 16 is supported by Figure A-4 and adopted here. *See,* e.g., Figure A-4 at low section stations 37+05, 42+00, 51+00 (+10 feet MLLW) and high section stations 19+00, 24+00, 27+00, 31+00, 34+00 (+20 feet MLLW).

20. The lower elevations of the breakwater surveyed in 1985 resulted from general subsidence of the entire King Harbor area caused by petroleum withdrawal. The Corp. of Engineers

did not consider future petroleum withdrawal, or whether the breakwater might subside as a result of future petroleum withdrawal, in designing and constructing the breakwater.

21. The Corps of Engineers did not restore the breakwater to its design height between the 1985 survey and the storm.

22. "Significant wave" height is the term commonly used by coastal engineers as a measure of storm intensity. "Significant wave" height is the average of the largest one-third of all of the wave heights in a sea state.

23. The storm damaged the breakwater.

24. The Portofino Inn was constructed on Mole C in 1965.

25. Portofino Partners purchased the Portofino Inn in 1986.

26. The UNITED STATES was negligent in designing, constructing, maintaining and improving the breakwater.

27. THE UNITED STATES was negligent in failing to consider the potential for subsidence due to petroleum withdrawal in the Redondo Beach Harbor when designing, constructing, maintaining and improving.

28. The discrepancy between the crest elevation of the breakwater as designed in The Army Corps' General Design Memorandum No. 1 and General Design Memorandum No. 2, and as surveyed in 1985 by the Army Corps, legally and proximately caused a discrepancy between the intended height and the actual height of Mole C.

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29. The discrepancy between the crest elevation of the breakwater as designed in The Army Corps' General Design Memorandum No. 1 and General Design Memorandum No. 2, and as surveyed in 1985 by the Army Corps was caused by subsidence.

30. The subsidence of the breakwater made the breakwater more susceptible to the breaches which occurred during the January 1988 storm.

31. The subsidence of the breakwater caused the highest significant wave height in the Redondo Beach King Harbor during the January 1988 storm to increase by approximately two feet.

32. The subsidence of the breakwater together with the subsidence of Mole C caused a tenfold increase in wave power impacting the midpoint of the hotel during the height of the storm.

33. The subsidence of the breakwater caused a five to sixfold increase in the wave power impacting the south corner of the hotel during the height of the storm.

34. The subsidence of the breakwater was a substantial factor in bringing about the damage to the Portofino Inn.

35. The negligence of THE UNITED STATES in designing, constructing, maintaining and improving the breakwater was a substantial factor in bringing about the damage to the Portofino Inn.

39. West Group, Inc. and Portofino Partners did not assume the risk when they purchased the Portofino Inn that the Portofino Inn would be damaged by storms due to subsidence of the breakwater or due to the negligence of THE UNITED STATES in failing to design, construct, maintain and improve the breakwater.

40. TRAVELERS INDEMNITY COMPANY OF ILLINOIS indemnified West Group, Inc. and Portofino Partners pursuant to the terms of its insurance policy for damage sustained by the Portofino Inn during the January 1988 storm.

41. Any of the Conclusions of Law set forth below which as deemed to be Findings of Fact should be incorporated herein.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq.

2. Venue is proper pursuant to 28 U.S.C. § 1402(b) since the acts and omissions complained of occurred in the Central District of California.

3. THE UNITED STATES owed a duty to exercise reasonable care in designing, constructing, maintaining and improving the breakwater.

4. THE UNITED STATES breached its duty of reasonable care in designing, constructing, maintaining and improving the breakwater.

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5. THE UNITED STATES negligence in designing, constructing, maintaining and improving the breakwater was a legal cause of damage to the plaintiff.

6. Plaintiff did not assume the risk of the damages caused by THE UNITED STATES.

7. Flood control was not a purpose of the breakwater within the meaning of 33 U.S.C. § 8712c.

8. The provisions of 33 U.S.C. § 702c do not apply so as to preclude the Court's subject matter jurisdiction to entertain this action.

9. The discrepancy between the crest elevation of the breakwater as designed in the Army Corps' General Design Memorandum No. 1 and General Design Memorandum No. 2, and as surveyed in 1985 by the Army Corps, were not the result of a decision on the part of defendant subject to the discretionary function exception, 28 U.S.C. § 1346(b) and 2680(a).

10. THE UNITED STATES cannot invoke the protection of the discretionary immunity function for its decision not to maintain the breakwater at the levels in the original design memorandum.

11. West Group, Inc. and Portofino Partners has a legal right to recover damages from THE UNITED STATES.

12. TRAVELERS INDEMNITY COMPANY OF ILLINOIS has an equitable right of subrogation under the insurance policy issued to West Group, Inc. and Portofino Partners to recover any amounts which West Group, Inc. and

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Portofino Partners had a legal right to recover from THE UNITED STATES.

DATED: February 12, 1996

s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 19, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-56275

D.C. No. CV-90-05237-MRP (Ex)
Central California
(Los Angeles)

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA

Defendant-Appellant.

ORDER

Before: HUG, Chief Judge; PREGERSON and BEEZER, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing. Chief Judge Hug and Judge Pregerson have voted to reject the suggestion for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E — RELEVANT STATUTES

28 U.S.C. § 1346(b)(1)

§ 1346. United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

28 U.S.C. § 2671

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or

naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

* * *

28 U.S.C. § 2674

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial

or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * *

28 U.S.C. § 2680

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

33 U.S.C. § 541

§ 541. Board of Engineers for Rivers and Harbors; establishment; duties and powers generally

There shall be organized in the Office of the Chief of Engineers, United States Army, by detail from time to time from the Corps of Engineers, a board of seven engineer officers, a majority of whom shall be of rank not less than lieutenant

colonel, whose duties shall be fixed by the Chief of Engineers, and to whom shall be referred for consideration and recommendation, in addition to any other duties assigned, so far as in the opinion of the Chief of Engineers may be necessary, all reports upon examinations and surveys provided for by Congress, and all projects or changes in projects for works of river and harbor improvement prior to June 13, 1902, or thereafter provided for. And the board shall submit to the Chief of Engineers recommendations as to the desirability of commencing or continuing any and all improvements upon which reports are required. And in the consideration of such works and projects the board shall have in view the amount and character of commerce existing or reasonably prospective which will be benefited by the improvement, and the relation of the ultimate cost of such work, both as to cost of construction and maintenance, to the public commercial interests involved, and the public necessity for the work and propriety of its construction, continuance, or maintenance at the expense of the United States. And such consideration shall be given as time permits to such works as have, prior to June 13, 1902, been provided for by Congress, the same as in the case of new works proposed. The board shall, when it considers the same necessary, and with the sanction and under orders from the Chief of Engineers, make, as a board or through its members, personal examinations of localities. And all facts, information, and arguments which are presented to the board for its consideration in connection with any matter referred to it by the Chief of Engineers shall be reduced to and submitted in writing, and made a part of the records of the office of the Chief of Engineers. It shall further be the duty of said board, upon a request transmitted to the Chief of Engineers by the Committee on Public Works and Transportation of the House of Representatives, or the Committee on Environment and Public

Appendix E

Works of the Senate, in the same manner to examine and report through the Chief of Engineers upon any projects adopted, prior to June 13, 1902, by the Government or upon which appropriations have been made, and report upon the desirability of continuing the same or upon any modifications thereof which may be deemed desirable. As used in this section the term "commerce" shall include the use of waterways by seasonal passenger craft, yachts, house boats, fishing boats, motor boats, and other similar water craft, whether or not operated for hire.

The board shall have authority, with the approval of the Chief of Engineers, to rent quarters, if necessary, for the proper transaction of its business, and to employ such civil employees as may, in the opinion of the Chief of Engineers, be required for properly transacting the business assigned to it, and the necessary expenses of the board shall be paid from allotments made by the Chief of Engineers from any appropriations made by Congress for the work or works to which the duties of the board pertain.

* * *

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No. 97-2028

In the Supreme Court of the United States

OCTOBER TERM, 1997

TRAVELERS INDEMNITY COMPANY OF ILLINOIS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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9 pp

QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act (28 U.S.C. 2680(a)) applies to a decision of the United States Army Corps of Engineers to await the results of a technological study before raising the height of a breakwater.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion of the district court (Pet. App. 19a-27a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1997. A petition for rehearing was denied on March 19, 1998. Pet. App. 28a. The petition for a writ of certiorari was filed on June 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1950, Congress authorized the expansion and improvement of an existing breakwater at what is now known as King Harbor in Redondo Beach, California. River and Harbor Act of 1950, ch. 516, § 101, 64 Stat. 166. The United States Army Corps of Engineers (Corps) prepared a detailed plan for the breakwater improvement, indicating that the breakwater's crest should be raised to 14 feet above a specified water level. Pet. App. 20a. The project was completed in 1958. *Id.* at 21a. Because the breakwater was not as effective in aiding navigation as had been hoped, however, the Corps undertook a second project, completed in 1964, to raise parts of the breakwater from 14 to 22 feet over the specified water level. *Ibid.*

In 1980 and 1983, storms caused significant damage at King Harbor. Pet. App. 5a. As a result, the Corps began studying the possibility of increasing the remaining 14 foot portions of the breakwater to 22 feet. *Ibid.* During this period, the Corps discovered that, as a result of subsidence, some breakwater sections were only 12 feet high and not 14 feet as intended. *Ibid.* The Corps thus needed to choose whether and how to proceed with future breakwater construction. It decided not to return the relevant portions of the breakwater to a height of 14 feet—a task that, in itself, would have been a "major, not a trivial, engineering project" (*id.* at 6a)—but to continue the ongoing study for raising the breakwater to 22 feet. *Ibid.* In other words, the Corps elected to "put off the smaller improvement * * * while it studied a much larger improvement." *Id.* at 9a.

In 1988, an extraordinary storm—"the kind that hits Redondo Beach only once every sixty or seventy

years" (Pet. App. 6a)—caused substantial damage to several business establishments built on erected mounds of land ("moles") in the interior of the harbor. The damaged establishments included the Portofino Inn and Reuben's Restaurant. *Id.* at 6a, 20a, 24a.

2. This lawsuit was filed by petitioner, an insurance company, against the United States for damages sustained by the Portofino Inn. The suit was brought under the Federal Tort Claims Act (FTCA or Act), 28 U.S.C. 2671 *et seq.* The Act provides that, as a general matter, "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances[.]" 28 U.S.C. 2674. The Act's "discretionary function exception," however, preserves the United States' immunity from suit for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). The district court entered judgment in favor of petitioner, finding, among other things, that the Corps had acted negligently in its handling of the breakwater (Pet. App. 23a-24a), and that the discretionary function exception was inapplicable (*id.* at 26a).

After the district court issued that ruling, the court of appeals decided a parallel case involving claims against the United States for damage to Reuben's Restaurant during the same storm. *National Union Fire Ins.* v. *United States*, 115 F.3d 1415 (9th Cir. 1997) (reprinted at Pet. App. 3a-18a), cert. denied, 118 S. Ct. 1053 (1998). In that case, the Ninth Circuit held that the discretionary function exception

does preserve the United States' immunity from suit for the matters at issue here. The court held that "[t]he Corps had statutory discretion," that "there was no regulation or policy requiring the Corps to monitor the breakwater height," that the Corps' judgments concerning the breakwater were "based on considerations of public policy," and that "where a statute or policy plainly requires the government to balance expense against other desiderata, then considering the cost of greater safety is a discretionary function." Pet. App. 16a-17a. This Court denied certiorari. 118 S. Ct. 1053 (1998).

On November 20, 1997, in an unpublished memorandum decision, the court of appeals reversed the district court's decision in the present case in light of its earlier holding in *National Union*. Pet. App. 1a-2a.

ARGUMENT

This Court recently denied certiorari in *National Union*, 118 S. Ct. 1053 (1998), a case arising from the same underlying facts as this one and involving issues substantially identical to those presented here. The court of appeals' factbound ruling in this case is no more worthy of this Court's review.

The governmental actions in question were fundamentally discretionary in character. The Corps decided that it would be inappropriate to deal with the problem of subsidence by engaging in costly efforts to add two feet to the relevant portions of the breakwater. Instead, balancing several statutory factors (see Pet. App. 9a-10a), the Corps elected to deal with the subsidence problem as part of a larger construction effort to make much more substantial improvements to the breakwater as a whole. *Id.* at 15a. As

the court of appeals held in *National Union*, that exercise of discretion is precisely the kind of governmental judgment that the discretionary function exception protects from judicial second-guessing. *Id.* at 15a-17a.

Petitioner nonetheless contends (Pet. 11-12) that the Corps' decision here should be characterized as an "operational decision" rather than a "planning-level decision," and suggests that only "planning-level decisions" fall within the scope of the discretionary function exception. Whether or not petitioner's characterization of this particular decision is correct,[1] petitioner's proposed distinction between "operational" and "planning-level" decisions is without merit. As this Court has repeatedly emphasized, "[d]iscretionary conduct is not confined to the * * * planning level," and the discretionary function exception "reach[es] decisions made at the operational or management level" as well. *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991) (distinguishing *Dalehite* v. *United States*, 346 U.S. 15 (1953)); see also *United States* v. *Varig Airlines*, 467 U.S. 797 (1984). There is also no merit to petitioner's contention (Pet. 10-13) that the decision below conflicts with other decisions of the same court of appeals. This Court does not grant certiorari to resolve claims of intracircuit conflicts, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), and, in any event, the court of appeals

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[1] Petitioner's characterization of the decision as "operational" rests on the premise that the Corps had a policy requiring it to monitor the breakwater height and assure that it continued to conform to its design specifications. See Pet. 13. But the court of appeals found to the contrary in *National Union*, Pet. App. 16a, and petitioner's disagreement with that finding of fact does not warrant further review.

correctly determined that the decision below is fully consistent with other Ninth Circuit precedent. Pet. App. 15a-17a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1998